IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF

MONTANA MISSOULA DIVISION

FILED
MISSOULA, MT
2005 NOV 18 AM 10 21
PATRICK E. DUFFY
BY ____________
DEPUTY CLERK

RICHARD LEE MUSCHIK
PETITIONER/DEFENDANT

- v -

UNITED STATES OF AMERICA
RESPONDENT/PLAINTIFF

Cause No. CV-04-149-M-LBE

U.S. Magistrate Judge
Leif B. Erickson

MOTION FOR RECONSIDERATION ON FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE'S DISMISSED OPINION

MOTION FOR RECONSIDERATION ON FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE'S DISMISSED OPINION

RICHARD LEE MUSCHIK ACTING IN PROPRIA PERSONA

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U.S. District Court
Clerk of the Court
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Q U E S T I O N S   P O S E D

1. WHETHER THE PROPER STATUTORY PROVISIONS ARE CORRECT FOR A PRISONER IN CUSTODY TO ATTACK HIS STATE PRIOR INFORMATION USED TO ILLEGALLY ENHANCE A FEDERAL SENTENCE BECAUSE SAID STATE INFORMATION WAS PLED AS DISJUNCTIVE ALLEGATIONS AND DUPLICIOUS AND EXPOSED TO DOUBLE JEOPARDY ?

2. WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL IN STATE COURT AND FEDERAL COURT IN FAILING TO CHALLENGE THE WANT OF SUBJECT MATTER JURISDICTION AND A MEANINGFUL ADVERSARIAL TESTING PROCESS TO THE PROSECUTION PREJUDICED TO MANIFESTLY AND FUNDAMENTALLY UNFAIR AND UNCONSTITUTIONAL SENTENCING PROCEDURES CLEARLY AGAINST FEDERAL LAW AND PROCEEDINGS ?

3. WHETHER TITLE 28 U.S.C. § 1651 AND THE WRIT OF ERROR CORAM NOBIS ARE AVAILABLE AFTER THE ANTITERRORISM EFFECTIVE DEATH PENALTY ACT WAS IMPOSED IN 1996 ?

4. WHETHER AN EVIDENTIARY HEARING IS IN ORDER TO DECIDE THE **CONSIDERATION OF RULING ON THE MERITS ?**

TABLE OF CONTENTS

	PAGE(S)
MOTION FOR RECONSIDERATION ON FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE'S DISMISSED OPINION	cover
QUESTIONS POSED	i
TABLE OF CONTENTS	ii
SUMMARY OF ARGUMENT	iii-vii
TABLE OF AUTHORITIES	viii
TABLE OF STATUTES	viii
PETITIONER ACTING IN PROPRIA PERSONA	1
MEMORANDUM OF LAW	2-6
CONCLUSION	7
CLAIM UPON WHICH RELIEF MAY BE GRANTED	8
PRAYER FOR RELIEF	8
CERTIFICATE OF SERVICE	9

DOCTRINE OF STARE DECISIS

SUMMARY OF ARGUMENT

Petitioner comes now within the 10 day period of limitations to file this motion for reconsideration according to statute. I shall be pleading case law that supports my in custody status and ineffective assistance in challenging subject matter jurisdiction. An illegally enhanced federal sentence based upon an invalid state pled information in the disjunctive, duplicity and exposure to the double jeopardy clause of the U.S. Constitution.

Invoking the doctrine of stare decisis means judicial precedents are binding and persuasive as the nature and scope intended by Congress. Under the doctrine of stare decisis, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are essentially the same. The rule of stare decisis is a judicial policy, based on the principle that, absent powerful countervailing considerations, like cases should be decided alike in order to maintain stability and continuity in the law.

The doctrine is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion.

S U M M A R Y O F A R G U M E N T (C O N T .)

This Honorable U.S. District Court Magistrate should realize that the doctrine of stare decisis is the preferred course because it promotes even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Stare decisis is intended to insure that people are guided in their personal and business dealings by prior court decisions, through established and fixed principles they announce. Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. Stated otherwise, stare decisis is the most important application of a theory of decisionmaking consistency in our legal cuture and it is an obvious manifestation of the notion that decisionmaking consistency itself has normative value.

Petitioner/Muschik also states that the doctrine of stare decisis permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. The doctrine of stare decisis is crucial to the system of justice because it ensures predictability of the law and the fairness of the adjudication.

SUMMARY OF ARGUMENT (CONT.)

Stare decisis is also justified because it saves resources, and it promotes judicial efficiency. The doctrine of res judicata, which rests on a different principle from stare decisis, provides that when a court of competent jurisdiction renders a final judgment on the merits without fraud or collusion that judgment is conclusive of the causes of action and of the facts or issues litigated in it as to the parties and their privies in all other actions in the same or other judicial tribunals or concurrent jurisdictions. In contrast, stare decisis applies even where different parties are involved in the later case, in which a prior decision is invoked as precedent, than were involved in the case in which the precedent was established.

Petitioner/Muschik states that, also, stare decises is based on the legal principle or rule involved in a prior case and not on the judgment which resulted from that case. Stare decisis is also distinguished from the doctrine of the "law of the case." As distinguished from issue preclusion and claim preclusion, the doctrine of the law of the case addresses the potentially preclusive effect of judicial determination made in the course of single litigation before a final judgment.

SUMMARY OF ARGUMENT (CONT.)

Particularly where a precedent or series of precedents has been treated as authoritative for a long time, courts are generally reticent to deviate from that policy, especially where the precedent has been followed for a long period of years. Any departure from the doctrine of stare decisis demands special jusification, and while the phrase special jusification defies simple definition, it does requires more than that a prior case was wrongly decided, but the most cogent reasons and inescapable logic require it because stare decisis has been fixed in the fabric of the law.

Any detours from the straight path of stare decisis occur for articulable reasons and only when the court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained. An appellate court should follow established precedent unless there exists a compelling and urgent reason not to do so which destroys or overshadows the policy or purpose which the precedent established. However, even if the earlier precedent was wrongly decided, the court will not overrule the precedent where any adverse or harmful effects have been limited or where it has remained standing for a significant period and many have relied on it, such as in the case of a rule of property.

SUMMARY OF ARGUMENT (CONT.)

A decision has stare decisis effect with regard to a later case only if the legal point on which the decision in both cases rests is the same or substantially the same. As an institution cloacked with public integrity and legitimacy, a state's supreme court cannot recede from its own controlling precedent when the only change has been the membership of the court.

Stare decisis has the greatest force in actions involving constitutional issues, such as in this instant cause at bar and in equity, particularly where a constitutional provision is to be interpreted. The force of the principle of stare decisis in cases involving issues of state constitutional interpretation, though substantial, is not as great as on questions of statutory construction.

The bottom line is that the doctrine of stare decisis should be applied wherever Petitioner has cited case law in support of his writ of error coram nobis and 28 U.S.C. § 1651 in accordance with the rule of law. The legal and proper statutory provisions are open to Petitioner/Muschik, the "in custody" case law being established many years ago, and, this clearly extraordinary and compelling circumstances, manifest jurisdictional defective issues.

TABLE OF AUTHORITIES PAGE(S)

Blanton v. U.S., 94 F. 3d. 227 (1996) 4

Brennan v. Midwestern United Life Insurance Co., 450 F. 2d. 999, cert. den., 92 S. Ct. 957, 405 U.S. 921, 30 L. Ed. 2d. 792 6

Halloway v. U.S., 393 F. 2d. 731 (9th Cir. 1968) . . 4

Hirabayashi v. U.S., 828 F. 2d. 591 (9th Cir. 1987) . . 4

Hubbard v. U.S., ____U.S.____, ____, ____, 115 S. Ct. 1754, 1765, 131 L. Ed. 2d. 779 (1995) 5

U.S. v. Hansen, 906 F. Supp. 688 (1995) 4-5

U.S. v. Hawkins, 973 F. Supp. 825 (1997). . . . 3

Wisconsin Right to Life, Inc. v. Federal Election Commission, 125 S. Ct. 2, 159 L. Ed. 2d. 805, 2004 WL 2086023 . . 3

TABLE OF STATUTES PAGE(S)

Antiterrorism Effective Death Penalty Act, . . . 2

28 U.S.C. § 1651. . . . . 2, 7

28 U.S.C. § 2254. 3

28 U.S.C. § 2255. . . . . 3, 7

28 U.S.C. Rule 60 (b)(4) 7

FILED
NOV 1 8 2005
PATRICK E. DUFFY, CLERK
By
DEPUTY CLERK, MISSOULA

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- v -	(	U.S. Magistrate Judge Leif B. Erickson
UNITED STATES OF AMERICA RESPONDENT/PLAINTIFF	(	MOTION FOR RECONSIDERATION ON FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE'S DISMISSED OPINION

MOTION FOR RECONSIDERATION ON FINDINGS AND RECOMMENDATIONS

OF UNITED STATES MAGISTRATE JUDGE'S DISMISSED OPINION

TO THE HONORABLE U.S. MAGISTRATE JUDGE:

NOW HERE COMES, Petitioner/Defendant, Richard Lee Muschik, acting in propria persona and in want of counsel and respectfully request that this Honorable Court grant this MOTION FOR RECONSIDERATION ON FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE'S DISMISSED OPINION, towards the ends of justice.

MEMORANDUM OF LAW

Petitioner states that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is not the final means to the end, although it is a catchy phrase. AEDPA does not place any time limit of Title 28 U.S.C. § 1651 or writ of error coram nobis and these are the only remaining means to address a fundamentally and manifest miscarriage of justice to cure want of jurisdiction for an unconstitutionally enhanced federal sentence, due to a illegally applied state conviction.

In the 28 U.S.C. § 1651 Writs (a),

> " The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Petitioner/Muschik has no other adequate means to attain desired relief and establishes that right to the All Writs Act is clear and indisputable. The coram nobis is a hybrid action, quasi civil and quasi criminal, and it is available in a criminal case to correct fundamental errors that render that proceeding irregular and make the judgment invalid.

The usual remedies are long used, such as 28 U.S.C. § 2255, Rule 60 (b)(4), § 2254, etc. The Magistrate is in error in that I have not waited fourteen (14) years to litigate, rather, I have already been litigating for 14 years. While it has indeed been 14 years since I have been before this particular court, I was in the U.S. District Court in Helena, which is where I actually filed this instant cause but for some reason was transferred to this court.

My legal rights are indisputably clear in that a fair hearing was not had in any of my filings and a manifest injustice is still occurring and causing great harm, prejudice and suffering to me because of the lingering consequences of an unconstitutional state information which was used to enhance a federal sentence and never ruled on the merits. See, Wisconsin Right to Life, Inc. v. Federal Election Commission, 125 S. Ct. 2, 159 L. Ed. 2d. 805, 2004 WL 2086023,

> " Authority granted to courts under All Writs Act is appropriately exercised only: (1) when necessary or appropriate in aid of court's jurisdiction; and (2) when legal rights at issue are indisputably clear."

Also see,

U.S. v. Hawkins, 973 F. Supp. 825, 1997,

> " Where challenged sentence had already expired or been served, motion to vacate it would be treated as motion for writ of error coram nobis."

Blanton v. U.S., 94 F. 3d. 227, 1996,

> " Doctrine of laches did not bar petition for writ of error coram nobis which involved claims of ineffective assistance by counsel who had represented defendant during trial, previous appeals, and motions to vacate, even though petition was filed ten years after conviction; counsel's representation apparently ended when second motion to vacate was dismissed, and coram nobis petition was filed approximately three years later."

Halloway v. U.S., 393 F. 2d. 731 (9th Cir. 1968),

> " One purpose of coram nobis is to allow defendant to attack conviction notwithstanding fact that he has completed sentence."

Also see,

Hirabayashi v. U.S., 828 F. 2d. 591 (9th Cir. 1987),

> " Coram nobis writ allows court to vacate its judgments for errors of fact in those cases where errors were of most fundamental character so as to have rendered proceeding itself invalid."

The state and especially the federal proceedings were of the most fundamentally flawed character, thus, both proceedings were not only invalid but void ab initio. See, U.S. v. Hansen, 906 F. Supp. 688, (1995),

" Writ of error coram nobis arises from common law and is equitable tool for federal court to fill interstices of federal post-conviction remedial framework.

Through writ of error coram nobis, federal judge who imposed sentence had discretionary power to set aside underlying conviction and sentence which, for valid reason, should never have been entered.

Unlike 'in custody' limitation of habeas statute, petitioner may collaterally attack federal conviction under common law writ of error coram nobis even though petitioner is no longer serving sentence pursuant to that conviction.

Whether to grant relief under writ of error coram nobis is decision committed to court's discretion; federal judges may exercise their discretion by granting relief to correct serious defects underlying conviction or sentence if those defects were not correctable on appeal or where exceptional circumstances otherwise justify such relief."

Hubbard v. U.S., ____U.S.____, ____, ____, 115 S. Ct. 1754, 1758, 1765, 131 L. Ed. 2d. 779 (1995),

" [f]ull retroactivity [is] a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place."

C O U R T S H O U L D R U L E O N T H E M E R I T S

The ends of justice must prevail in that the judgment was clearly erroneous because an invalid, unconstitutional state information, void on its face, was used to illegally enhance a federal sentence. Ruling on the merits, for once, will show that the state prior conviction used to enhance this federal sentence, was plead in the information as disjunctive allegations, duplicity as well as exposing Petitioner to double jeopardy In the case of Brennan v. Midwestern United Life Insurance Co., 450 F. 2d. 999, cert. den., 92 S. Ct. 957, 405 U.S. 921, 30 L. Ed. 2d. 792,

> " Although this rule providing for relief from judgment is not substitute for appeal and finality of judgments ought not to be disturbed except on very narrow grounds, liberal construction should be given this rule to the end that judgments which are void or are vehicles of injustice not be left standing."

The federal court should not circumvent statutes or keep putting Petitioner through a labyrinthine of impossible methodology in order to prevent him from receiving his American citizen rights my father and grandfather fought to the death to defend. With the Sword of Domocles hanging over my head and no matter which way I turn there is convoluted law, misconstruing of simple constitutional rights, and overlooking one thing ... RULING ON THE MERITS.

C O N C L U S I O N

Petitioner is in custody for purposes of challenging his state information as invalid and in violation of federal law and in custody for attacking his federal sentence as invalid for enhancing a federal sentence with an unconstitutional state prior conviction. Ineffective assistance of counsel, want of subject matter jurisdiction, abuse of discretion, prosecutorial misconduct and plain old fashion prejudice. Once Petitioner brought up the fact that the government was using a invalid state prior to enhance a federal sentence, the judge remained silent, counsel refused to challenge the jurisdiction and thus, no one would rule on the merits. They would not rule on the merits in U.S. District Court, U.S. Appellate Court, U.S. Supreme Court on direct appeal, would not rule on the merits in a 28 U.S.C. § 2255 in district, appellate or Supreme Court, would not rule on the merits on a 60 (b)(4) in district court, appellate court or Supreme Court. Now, here is a writ of error coram nobis and a 28 U.S.C. § 1651 ALL WRITS ACT which our Congress has established for extraordinary circumstances for which **TEN (10) YEARS** has been added, unconstitutionally, illegally and erroneously in violation of Federal Rules of Criminal Procedures, Federal Rules of Civil Procedures, Federal Rules of Evidence, case law, statutory provisions and personal bias. Court acts like I just dropped in from Mars and in fact appears to operating on another dimension of self imposed theology.

CLAIM UPON WHICH RELIEF MAY BE GRANTED

It is this Petitioner's opinion, which might seem to be very ignorant of law, because I am, or simply stupid, which is how I feel, but I ask, with respect for American judicial justice, that my due process of law rights be granted. Under the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution, that this Honorable Magistrate RULE ON THE MERITS after a 14 year wait, that my federal sentence was illegally enhanced because of an invalid state prior information. I have been in federal and state court for 14 years, I just did not begin this labyrinth journey, and if takes 3 more years upon completing this illegal sentence, so be it, but for the want of an honest and fair and reasonable jurist, may the Lord have mercy on his soul. I have tried, suffered, filed, over and over again, to judges, magistrates, state judges, in banc courts, presented cases from the Ninth Circuit, presented cases from the United States Supreme Court, every other circuit and pled my cause with honesty, good faith and blood, sweat and tears (not the music group) and yet, here I am, waiting for court to follow its own laws, rules, case precedent and to do the right thing.

PRAYER FOR RELIEF

Petitioner/Muschik comes now and prays that this Honorable Court will grant his request to rule on the merits of his illegally enhanced federal sentence based upon an invalid state prior information.

CERTIFICATE OF SERVICE

I, Petitioner, Defendant, Richard Lee Muschik, do hereby swear under penalty of perjury that a true and correct copy(s) of this MOTION FOR RECONSIDERATION ON FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE'S DISMISSED OPINION, was mailed, postage prepaid, from the FCI-Pekin, Illinois legal mailbox, to the parties listed below, on the 3 Rd day of November 2005.

Respectfully Submitted,

Richard Lee Muschik

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